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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

INTRODUCTION

This case presents the question whether, under the Income Tax Law of Puerto Rico, a taxpayer may maintain an action in court, practically in the nature of an appeal from the insular Treasurer's decision, for a refund, in an amount greater than determined by the Treasurer, of supposed over-payments of income taxes paid voluntarily and without protest upon the taxpayer's own income tax return.

The insular Supreme Court, affirming the District Court, and following its own prior decisions, held the Treasurer's decision final in such a case.

The Circuit Court of Appeals, First Circuit, reversed. This Court granted certiorari (R. 45).

The decision of the Circuit Court of Appeals was by a divided court. Each of the three Judges wrote a separate opinion covering this case and the companion case of *Porto Rico Fertilizer Co. vs. Rafael Sancho Bonet, Treasurer of Puerto Rico*, No. 3274 in that court, but PRESIDING JUDGE BINGHAM and JUDGE WILSON concurred in the result of affirming the judgment of the Supreme Court of Puerto Rico in the *Fertilizer* case, although reversing it in this case; while JUDGE MORTON concurred in affirming the judgment in the *Fertilizer* case, but dissented from the reversal in this case, holding that both judgments should be affirmed.

Both cases were actions at law to recover supposed over-payments of income taxes paid voluntarily and without protest upon plaintiffs' own original income tax returns under the Puerto Rican Income Tax Act of 1925. They differed in that the *Fertilizer Company* had not sought an appeal from the insular Treasurer's determination to the Board of Review and Equalization; whereas the present respondent, the sugar company, had done so. JUDGE BINGHAM says (R. 31): "In no other particular do the rights of the plaintiffs to maintain their causes of complaint differ".

This petitioner believes that the opinion of JUDGE MORTON is correct, and that the judgment of the Supreme Court of Puerto Rico (affirming that of the District Court) should have been affirmed in this case, as well as in the *Fertilizer* case.

QUESTIONS PRESENTED

The primary question is, as above stated, whether a taxpayer may maintain an action in court under the Income Tax Law of Puerto Rico against the Treasurer for a refund of supposed over-payments of income taxes

paid voluntarily and without protest in accordance with the taxpayer's own income tax return; or whether, upon a request or petition for such a refund, the taxpayer is concluded by the Treasurer's "determination" of the "correct amount of the tax", and of the refund, if any, to be made, under sections 54, 55, 64, and 75 of the Income Tax Act.

A subsidiary question is whether the Board of Review and Equalization has any jurisdiction to review and to bind the Treasurer by its decision on such a question of voluntary payments without protest; or whether its jurisdiction, and its power to bind the Treasurer by its decisions, is not limited to determining, solely, questions relating to **deficiency taxes** assessed by the Treasurer.

This petitioner believes that the primary question should be answered in the negative, and likewise the subsidiary question; that is to say, firstly, that the taxpayer is finally concluded by the Treasurer's determination of the correct amount of the tax due, upon a petition for refund of income taxes voluntarily paid without any protest in accordance with the taxpayer's own calculation of the tax upon his own tax return; and, secondly, that, upon such a question, the Board of Review and Equalization has no jurisdiction and no power to bind the Treasurer by its decision,—that, with relation to income taxes, its jurisdiction is limited solely to questions of the validity and amount of deficiency taxes assessed by the Treasurer.

This position is in accordance with the decisions of the insular courts, the District Court and the Supreme Court of Puerto Rico, in the present and earlier cases, and with the dissenting opinion of JUDGE MORTON in the Circuit Court of Appeals.

But JUDGES BINGHAM and WILSON held the contrary, although in separate opinions, in which, however, they concurred in their results.

STATUTES

Pertinent provisions of the Income Tax Act of Puerto Rico of August 6, 1925 (the so-called "Income Tax Act of 1924", as it is styled by section 1 of the Act) are in the Appendix, together with a few pertinent sections of the earlier Income Tax Acts of Puerto Rico of 1919 and 1921, and of the federal revenue laws.

Sections 24 to 27 of the Income Tax Act of 1925 provide for income tax returns to the Treasurer by individual taxpayers and fiduciaries, and sections 37 to 45 for returns by corporations, partnerships, and insurance companies.

Section 53 (Appendix, *infra*, pp. 52-53) provides for payment by the taxpayer (with some exceptions not pertinent here) on or before the 15th day of March (or of the third month following the close of the taxpayer's fiscal year), with a privilege of payment in two installments, and provisions allowing some further extension in some circumstances.

Section 54, entitled "Examination of Return and Determination of Tax", provides (Appendix, *infra*, p. 53) that, "as soon as practicable after the return is filed",

"The Treasurer shall examine it and shall determine the correct amount of the tax".

Section 55, entitled "Overpayments", provides (Appendix, *infra*, p. 53):

"If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 64."

Sections 56, 57, and 58 relate to "Deficiency Taxes" to be assessed by the Treasurer in case the taxpayer's return does not show any amount as the tax to be paid, or shows an amount less than the Treasurer "determines" that the tax should be, and for taxpayers' appeals to the Board of Review and Equalization from the Treasurer's determinations of such deficiency taxes; Section 59 deals with "Additions to the tax in cases of delinquency"; Section 60 with periods of limitation of time on the assessment of taxes; Section 62 with "Claims in Abatement" of "deficiency taxes" assessed by the Treasurer under section 57; and Section 63 with "Taxes under prior Acts" [not here involved].

Section 64, entitled "Credits and Refunds" (Appendix, *infra*, pp. 55-57) provides:

"(a) Where there has been an overpayment of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

Paragraph (b) of Section 64 allows a claim for such a credit or refund to be filed at any time within *four years* from the time the tax was paid.

Section 65 relates to taxpayers intending to depart from Puerto Rico; section 66 directs the Act to take effect retroactively as of January 1, 1924; section 67 makes certain "administrative, special, or stamp provisions of law" applicable in administering the Act; and section 68 (Appendix, *infra*, p. 59) authorizes the Treasurer to prescribe "all needful rules and regulations for the enforcement of this Act".

Section 69 requires taxpayers to keep records; sections 70, 71, and 72 deal with failure to make returns, false or fraudulent returns, and examinations of taxpayers' records by the Treasurer; section 73 with payments made upon compromise agreements; and section 74 with "retroactive regulations". None of these matters is here involved.

Section 75, entitled "**Refunds**", provides (Appendix, *infra*, p. 59):

"Section 75.—The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Porto Rico at the beginning of each regular session of all transactions under this section."

Section 76 is entitled "**Limitations upon Suits and Proceedings by the Taxpayer**". It provides: (Appendix, *infra*, pp. 59-60):

"Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Porto Rico.

"Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence, and the hearing shall be set promptly for final decision.

"If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case

sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Porto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

“(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.”

BEARING OF THE STATUTES ON THIS CASE

The controversy here centers principally around the application of sections 54, 55, 64, 75, and 76, *supra*, of the Act of 1925.

It is perfectly plain that, as JUDGE MORTON said in his opinion in the Circuit Court of Appeals (R. 40-41):

“There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions. (Sections 57 and 76(a).) If deficiency assessments are objected to the taxpayer

may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

"The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. The statute provides very specifically for the return of overpayments without any requirement of objection or protest against the original payment. (Sections 53,¹ 64). These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75). While no express provision is made therefor it is not doubted that a person who has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; and it is clearly the Treasurer's duty if overpayment is established to make a proper refund. The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, i.e. to pass on such claims for refund."

The Supreme Court of Puerto Rico held (R. 23-24), following its own prior decisions in the *Fertilizer* case, *supra*, and in an earlier case, that, on such a claim, the Treasurer's "determination" of the amount of the tax, under sections 54, 55, 64, and 75, was conclusive, and [in the absence of fraud or wilful abuse of authority, not here involved] could not be reviewed by the courts.

JUDGE MORTON agrees (R. 41-42); and, calling attention to the fact that what is here involved is a question of the construction of a local Territorial statute by the local Territorial Supreme Court, adds (R. 42):

"It has often been said that in matters of local law

¹ The figure "53" is manifestly a clerical error. This should read: "(Sections 55, 64)." *Confer* Appendix, *infra*, pp. 52-53; 53.

the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."

He holds (R. 41-42) that section 76(b) has no application here.

To the contrary, JUDGES BINGHAM and WILSON find (R. 32-34, and 37-40) in section 76(b) grants of authority, both: (a) To the taxpayer, to appeal to the Board of Review and Equalization from the Treasurer's determination in such a case, and for the Board to entertain the appeal, and to bind the Treasurer by its decision; and (b) To the courts, to entertain an action by the taxpayer to review the Treasurer's determination.

As above stated, this petitioner, the Treasurer of Puerto Rico, believes that JUDGES BINGHAM and WILSON are in error in this holding; and that JUDGE MORTON is right in agreeing with the unanimous decision of the Justices of the Supreme Court of Puerto Rico.

STATEMENT OF THE CASE

This was an appeal by the plaintiff-respondent sugar company to the Circuit Court of Appeals from a judgment of the Supreme Court of Puerto Rico dismissing the company's appeal from the insular District Court of San Juan and affirming the judgment of the District Court on the ground that the sole question involved in this suit had already been decisively determined adversely to the plaintiff company's contentions, in earlier decisions of the insular Supreme Court, followed in the present case (R. 18).

The company, a corporation of Puerto Rico, brought this suit against the insular Treasurer,² in the insular

² *As Treasurer*; not against him individually. The suit was originally brought against the former Treasurer, Manuel V. Domenech (R. 1-2); but his successor in office, the present Treasurer RAFAEL SANCHO BONET, was afterwards substituted as defendant (R. 27).

District Court of San Juan, for refund of a supposed over-payment of \$6803.66 alleged to have been voluntarily over-paid by it by mistake in paying to the insular Treasury \$25,234.92 on the company's own tax return for its insular income taxes for its fiscal year 1927, under the Puerto Rican Income Tax Act of 1925.³ Later on, the Treasurer assessed a "deficiency tax" of \$1301.51, from which the company appealed to the Board of Review and Equalization which overruled the Treasurer as to the "deficiency tax," and also found that the company had in fact over-paid the Treasury \$6803.66 in making its original income tax payment (*"Amended Complaint"*, R. 2-6). It appears (*"Amended Complaint"*, Pars. VII to X; R. 4-6) that the Board differed in opinion, both from the Treasurer and from the sugar company, as to the amount of the credit to be allowed the company on its item of "Repairs", for the preceding year 1926, carried over to the year here in question, of 1927.

No facts are alleged in the "Amended Complaint" from which it is possible to draw any independent conclusion as to the correctness of the decision of the Board of

³ Act No. 74 approved August 6, 1925 (Laws of Puerto Rico, 1925, pp. 400-550). The nomenclature is confusing, because Section 1 of the Act provides (Laws of 1925, p. 400):

This Act shall be known as the "Income Tax Act of 1924".

To avoid confusion, it will be referred to throughout this Brief as the "Act of 1925", or as the "Income Tax Act of 1925". There is no other "Income Tax Act of 1924" of Puerto Rico.

⁴ Nor appear anywhere else in the record; because the Treasurer's demurrer to the "Amended Complaint" was sustained by the District Court, and the sugar company elected not to amend, but to appeal directly to the insular Supreme Court (R. 8, 10, 17).

Review and Equalization, or as to whether the taxpayer itself was not really correct in its original calculation upon which it had made its own voluntary tax payment, or as to whether the Treasurer was not correct either in his original determination upon which he assessed the deficiency tax, or in his second determination, after the first decision of the Board, in which he receded from the deficiency tax and determined that a refund of \$525.56,—but of that amount only,—was due the company, as hereafter stated. The “Amended Complaint” contains no allegations as to the character of the “Repairs” involved. It relies wholly upon an assumption that the Treasurer was bound by the decision of the Board, not only as to the deficiency tax, but also as to the supposed voluntary overpayment by the taxpayer upon the face of its own original tax return.

It is alleged (“Amended Complaint”, Par. XI; R. 6) that, after the Board’s first decision, the plaintiff sugar company, in February, 1930, filed with the Treasurer “a petition for refund or credit”, which was decided by the Treasurer the following month, March 28, 1930,

“by granting to the plaintiff a credit or refund in the amount of \$525.56, instead of the sum claimed by the plaintiff in accordance with the above ruling of the Board of Review and Equalization”;

that (Par. XII; R. 6) the plaintiff sugar company, the next month, in April, 1930, took a second appeal to the Board from this decision of the Treasurer on its petition for refund or credit; and that the board, more than two years later, on August 22, 1932, decided that second appeal, “by affirming its original ruling of December 23, 1929, entered in the appeal taken with regard to the deficiency”.

The plaintiff’s claim is (“Amended Complaint”, Par. XIII; R. 6) that the Treasurer “in granting to the plaintiff a refund for taxes in the amount of \$525.56, plus \$60.21 for interest, instead of \$6803.66, plus the interest claimed

by the plaintiff, has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so, thus altering and modifying the ruling of the Board of Review and Equalization and disobeying the terms of said ruling”.

As above stated, there are no allegations of facts upon which any independent determination can be based as to the correctness of the calculations of the several parties—the Board, or the Treasurer, or the plaintiff itself upon its original payment on the face of its own tax return,—as to the item of the plaintiff’s “Repairs” for the preceding year of 1926, upon which their ideas differed.

The “Amended Complaint” is based wholly upon the assumption that the Treasurer was bound by the decision of the Board,—not only as to the deficiency tax, but also as to the petition for refund of the supposed over-payment voluntarily made in the original payment of the tax without protest in accordance with plaintiff’s own income tax return; and that the Treasurer, in “disobeying” the terms of the Board’s ruling, necessarily, as a matter of law, acted “in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so” (“*Amended Complaint*”, Par. XIII, *supra*, R. 6).

It is not alleged that the Plaintiff sugar company made any second request or petition to the Treasurer for refund or credit in accordance with the Board’s ruling, after the Board’s second decision of August 22, 1932. The company appears directly to have begun this suit against the Treasurer for the amount of the refund which the Board thought due it.⁵

⁵ The transcript of the record fails to show the date this suit was begun in the District Court. The “Amended Complaint” (R. 1-7) is dated July 11, 1933 (R. 7-8), nearly a year after the Board’s second decision of August 22, 1932. But in the meantime there had apparently been an original complaint, the proceedings upon which do not appear in the transcript of the record here; which begins (R. 1) with the “Amended Complaint”.

The defendant-appellee, the insular Treasurer, demurred (R. 8) on the ground that the payment had not been made under protest, but was voluntary. The District Court sustained (R. 9-10) the demurrer, and denied (R. 16-17) plaintiff's motion for rehearing. As stated, the insular Supreme Court dismissed plaintiff's appeal to it from the District Court, and on July 28, 1936, affirmed the District Court's judgment "because the tax was not paid under protest", in view of its own prior decisions, saying (R. 18):

"* * * this court held on the 24th instant in *Porto Rico Fertilizer Co. vs. Domenech, Treasurer*,⁶ following that of *Compañía Agrícola de Cayey, Ltd., vs. Domenech, Treasurer*, 47 P. R. R." (47 P. R. Dec. 535 (*Spanish edition*), September 29, 1934), "that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer."

On the plaintiff company's motion for reconsideration, the insular Supreme Court adhered to its decision in the present case, saying, March 17, 1937, in denying the motion for reconsideration (R. 23-24):

"The appellant sought to recover the excess payment from the Treasurer. Under Section 75 of Act No. 74 of 1925 (Session Laws, p. 400)" [at pp. 536-538; Appendix, *infra*, p. 59], "which under our most recent opinion (*Puerto Rico Fertilizer Company vs. Domenech*) we have held the act to be applicable, the Treasurer is authorized 'to remit, to refund and pay back all taxes erroneously or illegally assessed or collected * * *.'"

⁶ The *Fertilizer Company* case, *supra*, 49 P. R. Dec. 45 (*original opinion*), 50 *ib.* 405 (*rehearing*), and 51 *ib.* 67 (*second rehearing denied*), No. 3274 in the Circuit Court of Appeals, which was affirmed in the same opinions in which the present case was reversed by that court. Pertinent portion of the opinion on rehearing (50 P. R. Dec., at pp. 413-414, *supra*; *Spanish edition*; *English edition not yet published*) is in Appendix III, *infra*, pp. 62-66.

"This is a discretionary matter in the treasurer and our direct decision in the *Puerto Rico Fertilizer [Company]* case is that the said section gives the taxpayer no additional right to file a suit for the recovery of taxes. It makes no difference what the method taken by the taxpayer in the *Puerto Rico Fertilizer Company* case was, for we feel bound to hold without special reference to the procedure in that case, that its reasoning and the reasoning of this case compels us to declare that the appellant is without remedy by suit.

"Taxes voluntarily paid in the absence of a statute authorizing it can not ordinarily be recovered. *Little v. Bowers*, 134 U. S. 54" [should read p. 547]; "61 C. J. 985. It is true that under Act No. 80 of 1919 a direct suit was allowed against the Treasurer to recover taxes voluntarily paid. Since 1921, however, the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated. *Compañía Agrícola de Cayey, Ltd., v. Domenech*, 47 P. R. R. [47 P. R. Dec. 535, *supra*]. The mere fact that the Legislature gave a taxpayer the right to recover under certain circumstances does not confer that right under different circumstances, namely, when a person does not pay under protest.

"By legislative enactment a payment under protest is a condition precedent to recovery by suit.

"The motion for reconsideration should be denied."

In the *Porto Rico Fertilizer Company* case, to which the Supreme Court of Puerto Rico made reference in its opinion in this case, as above quoted (*Porto Rico Fertilizer Co. vs. Manuel V. Domenech, Treasurer of Puerto Rico, supra*) that court said upon rehearing, July 23, 1936,⁷

⁷ 50 P. R. Dec. 405, 415 [*Spanish edition; English edition, not yet published*]; translation appearing on page 30 of the Record in that case in the Circuit Court of Appeals, No. 3274 (Appendix III, *infra*, pp. 64-65; *Confer* footnote 6, *ante*, p. 13).

"As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice."

OPINIONS OF THE CIRCUIT COURT OF APPEALS

In the Circuit Court of Appeals, no two of the judges wholly agreed with each other. Each of the three judges filed his own separate opinion; but, as above stated, PRESIDING JUDGE BINGHAM and JUDGE WILSON concurred in the results, affirming the judgment of the insular Supreme Court in the *Fertilizer* case, and reversing in the present *Yabucoa Sugar Company* case.

JUDGE MORTON agreed with the affirmance in the *Fertilizer Company* case, but dissented from the reversal in the present case, saying: "I think both judgments should be affirmed" (R. 43).

PRESIDING JUDGE BINGHAM's opinion (R. 29-34), after noting (R. 33) that

"Section 75 authorizes the Treasurer 'to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, or penalties collected without authority, and all taxes that appear to be unjustly assessed and excessive in amount, or in any manner wrongfully collected,' "

concludes (R. 33) that:

“ * * Section 76(b) was intended to authorize the maintenance of a suit against the Treasurer, in case he refused to pay back the illegal or excessive tax collected, as he was authorized and directed to do under Sections 75, 65,⁸ and 64. It certainly could not have been the intention of the law maker to leave the payment of the taxpayer's just claim *solely* to the whim of the Treasurer.”

JUDGE BINGHAM, in effect, ignored⁹ the question *whether or not the Board of Review and Equalization has jurisdiction* of an appeal from the Treasurer's determination of the amount of the refund, if any, to be allowed a taxpayer on his petition for refund of *supposed overpayments* of income taxes paid voluntarily and without protest in accordance with the taxpayer's own tax return [*as contradistinguished from an appeal from a deficiency tax assessed by the Treasurer*], and assumed without further argument or discussion that the amount found by the Board of Review and Equalization to be an over-payment is necessarily “justly due” the sugar company, saying (R. 32):

“ * * the sole question is whether it can maintain a

⁸ Apparently, this should read “55”, as should also his reference to “Section 65”, in the sixth line of page 33 of the Record.

⁹ Except for saying, in commenting on the Treasurer's regulations [*not pleaded, nor otherwise appearing in the record, and not mentioned in either of the opinions of the insular Supreme Court*]:

“Its only defect, as we view it, is in failing to give effect to the express language of Section 76(b) which calls not only for the presentation of a claim for refund to the Treasurer but also to the Board of Review and Equalization on appeal.” [*Confer, infra, Point VIII, pp. 42-45*].

suit against the Treasurer under 76(b) to recover *what is justly due it*, the tax having been paid without protest". (*Italics supplied*)

JUDGE BINGHAM also, in referring (R. 32-33) to the Treasurer's regulations, apparently infers that such regulations might be relied upon to sustain the jurisdiction of the court in this case.

JUDGE WILSON (R. 34-40) concurs "in the result of the opinion of JUDGE BINGHAM", but "on the grounds set forth below", in his own opinion.

He holds (R. 37-38, 39) that in case a question is raised as to supposed voluntary overpayment, and the Treasurer refuses to grant a refund in accordance with the plaintiff's claim, then

"the taxpayer under Section 76(b) may appeal to the Board of Review and Equalization" (R. 37-38), . . . the decision of which is final, which was done in this case" (R. 39);¹⁰

and that (R. 39):

"Section 76(b) *clearly implies* that a suit may be brought to recover any sum found to be due by the

¹⁰ Although the only sections of the Act authorizing appeals to the Board of Review and Equalization appear to be sections 57 and 62(b) [and, for a reconsideration, section 76(a)], which relate solely to appeals from the determination of the Treasurer in relation to **deficiency** taxes. There appears to be no provision in the statute providing [expressly, at least] for appeals to the Board in relation to claims for refunds of voluntary payments. [*Confer, infra*, pp. 24-25].

The language of section 76(b) does not appear, on its face, to grant any independent right of appeal to the Board, other than that already provided "*according to the provisions of law in that regard*". [*Appendix, infra*, p. 60].

Board of Review as an overpayment."¹¹ (*Italics supplied*)

He says further (R. 37):

"that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases"¹²

PETITIONER'S CONTENTION

Petitioner, as above indicated, believes that the unanimous decision of the Supreme Court of Puerto Rico, following its own earlier unanimous decisions in earlier cases interpreting this local Territorial statute, in relation to the questions here presented, was clearly right, and that JUDGE MORTON was right in agreeing with it.

That the Legislature, in conferring upon the Treasurer

¹¹ Holding as he does, that the taxpayer has a right of appeal to the Board in such a case of a claim of voluntary overpayment of taxes, and that the decision of the Board is "final", JUDGE WILSON, of course, pays no attention to the fact that the plaintiff's "Amended Complaint" does not contain any allegations upon which an examination can be based as to the correctness, in fact, of the respective differing conclusions of the Board, the Treasurer, and the taxpayer itself in its original return, as to the allowances to be made on its item of "Repairs" for its preceding fiscal year of 1926.

¹² But he has apparently failed to notice that there are no "conflicting decisions" of the insular Supreme Court upon the questions here involved of the supposed right of a taxpayer to appeal to the Board of Review and Equalization from the determination of the Treasurer under sections 54, 55, 64, and 75 of a claim for supposed voluntary overpayment, and of the supposed

the power to "determine the correct amount of the tax" (Sections 54 and 55 of the Act), and authorizing him to credit or refund overpayments (Sections 55, 64, and 75), plainly intended to make his "determination" of "the correct amount of the tax" final.¹³ This the Legislature had the power to do (*Dismuke vs. United States*, 297 U. S. 167, 171-172); since the Legislature of Puerto Rico possesses substantially all of the powers of a State Legislature in that regard (*People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261); and Puerto Rico is so far sovereign that it may not be sued without its own consent (*People of Puerto Rico vs. Rosaly*, 227 U. S. 270); and, at common law, taxes voluntarily paid cannot ordinarily be recovered at all in the absence of a statute authorizing it (*Little vs. Bowers*, 134 U. S. 547; *Moore Ice Cream Co. vs. Rose*, 289 U. S. 373, 375-376).

That the majority of the Circuit Court of Appeals,

right of the taxpayer to maintain an action in court, such as this, practically in the nature of an appeal to the courts from the Treasurer's determination of such a claim for refund of voluntary supposed overpayments. On those questions *there is no conflict in the decisions of the Supreme Court of Puerto Rico*. That court has uniformly (and unanimously) held, in three decisions, including that in the present case, that the Treasurer's determination of such a claim for a refund is final; that that is a matter entrusted by those sections of the statute to the Treasurer's determination; that he is "to judge the merits of each claim." The insular Supreme Court has never recognized any right of appeal from the Treasurer, from such a determination on a claim for refund of such voluntary payments under this Act of 1925, either to the Board of Review and Equalization, or to the courts. See *infra*, Points VI and VII, pp. 37-42.

¹³ *Except as to "deficiency taxes"*, with relation to which express provisions are made, *expressly providing* for appeals to the Board of Review and Equalization, and for recourse to the courts. Sections 57, 62(b), and 76(a) and (b).

JUDGES BINGHAM and WILSON, erred in reading into the negative prohibitory language of Section 76(b) of the Act affirmative grants of power (a) to the Board of Review and Equalization to entertain appeals and to bind the Treasurer in other cases than those relating to deficiency taxes, and (b) to the courts to entertain actions in the nature of appeals from the Treasurer's "determination" "of the correct amount of the tax" in other cases than those relating to deficiency taxes.

That the majority Judges also erred in disregarding the settled rule as to the respect to be paid to the decisions of the local Territorial Supreme Court interpreting a local Territorial statute; and erred in overlooking and disregarding the absence of any allegations in the "Amended Complaint" tending to impeach the Treasurer's decision on the merits in any way, or tending in any way to show that, as to the allowances to be made on the item of the plaintiff sugar company's "Repairs" for its fiscal year 1926,—upon which the calculations of the Board of Review, and of the Treasurer, and of the company itself in its initial tax return, differed among themselves,—there was any reason for giving any more weight to the Board's opinion than to that of the Treasurer,—(unless the Treasurer is to be considered as bound by the decision of the Board upon an appeal other than in relation to "deficiency taxes").

And that in each of the separate opinions of the two majority Judges, there is further error in that both of those two opinions overlook and are in conflict with the applicable decisions of this court, particularly *Dismuke vs. United States*, *supra*, 297 U. S. 167, 171-172; *Little vs. Bowers*, 134 U. S. 547; *Moore Ice Cream Co., vs. Rose*, 289 U. S. 373, 375-376; and, in connection therewith, the decisions of this court in *People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261, and *People of Puerto Rico vs. Rosaly*, 227 U. S. 270.

OPINIONS BELOW

The opinions of the insular District Court ("Order, R. 9-10), and "Judgment" overruling plaintiff's motion for reconsideration (R. 16-17), are not officially reported. The opinions of the insular Supreme Court on the first hearing (R. 18) and upon reconsideration (R. 23-24) are officially reported, respectively, in 50 P. R. Dec. 962 (*Spanish Edition*), and 51 P. R. Dec. 135 (*Spanish edition; Advance Sheets*). They have not yet appeared in the English edition of the Puerto Rico Reports. The three separate opinions of the judges of the Circuit Court of Appeals are reported in 98 F. (2d) 398-404.

JURISDICTION

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 29). The time within which to apply for a writ of certiorari to this court was extended fifty days by order of MR. JUSTICE BRANDEIS, until December 2, 1938 (R. 44).

The petition for certiorari, together with the supporting brief for petitioner, and the transcript of the record, was filed in this court on December 2, 1938, within the time thus limited. Certiorari was granted on January 30, 1939 (R. 45).

SPECIFICATIONS OF ERRORS TO BE URGED

These are indicated under the headings "Questions Presented" and "Petitioner's Contention" (*ante*, pp. 2-3 and 18-20).

SUMMARY OF ARGUMENT

This appears under the heading "Petitioner's Contention" (*ante*, pp. 18-20).

ARGUMENT

Point I

The Legislature of Puerto Rico was under no obligation to provide taxpayers any recourse to the courts from the insular Treasurer's "determination" of the "correct amount of the tax", upon taxpayers' petitions for refunds of supposed overpayments made voluntarily and without protest.

The Legislature may properly make the Treasurer's determination final in such cases.

A. This is the rule with relation to the federal government. This court said in *Dismuke vs. United States*, *supra*, 297 U. S. 167, 171-172;

"The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise. See *United States vs. Babcock*, 250 U. S. 328. * * * If the statutory benefit is to be allowed only in his" [the administrative officer's] "discretion, the court will not substitute their discretion for his."

B. The same rule is applicable with relation to the government of Puerto Rico, which is so far sovereign that it may not be sued, except with its own consent. *People of Puerto Rico vs. Rosaly*, 227 U. S. 270. The Legislature of Puerto Rico possesses substantially the same powers in this respect as the legislature of a State. *People of Puerto Rico vs. Shell Co.*, 302 U. S. 253, 260-261; and,

"The grant of legislative power in respect of local matters contained in section 32 of the Foraker Act¹⁴ and continued in force by section 37 of the Organic Act of 1917¹⁵ is as broad and comprehensive as lan-

¹⁴ Act of Congress of April 12, 1900, c. 191, 31 Stat. 77.

¹⁵ Act of Congress of March 2, 1917, c. 145. 39 Stat. 951, 964.

guage could make it." (*People of Puerto Rico vs. Shell Co.*, *supra*, at p. 261).

C. At common law, in the absence of statutory permission, there is no recourse to the courts for the recovery of taxes paid voluntarily and without protest. *Moore Ice Cream Co. vs. Rose*, 289 U. S. 374, 375-376; *United States vs. N. Y. & Cuba Mail S. S. Co.*, 200 U. S. 488; *Chesebrough vs. United States*, 192 U. S. 253; *Little vs. Bowers*, 134 U. S. 547; *Curtis' Adm'x. vs. Fiedler*, 2 Black 461; *Elliott vs. Swartwout*, 10 Pet. 137, 153.

Point II

The negative prohibitory language of section 76(b) of the Puerto Rican Income Tax Act of 1925 does not evidence any intent on the part of the Legislature thereby to make any affirmative grants of power either (a) to the Board of Review and Equalization to entertain any appeals or to bind the Treasurer by its decisions in any cases other than those relating to deficiency taxes assessed by the Treasurer, or (b) to the taxpayers of any recourse to the courts, or to the courts of any jurisdiction to entertain taxpayers' suits to review the Treasurer's determinations of the correct amount of the tax, in any cases other than those relating to "deficiency taxes".

A. The wording of section 76(b) of the Act of 1925 is exclusively negative and prohibitory, on its face.

B. It is a sub-paragraph (the second paragraph) of section 76; and the heading for the entire section, as enacted by the Legislature as a part of the law, is "LIMITATIONS upon Suits and Proceedings by the Taxpayer". There is here no indication of any intention on the Legislature's part to include in this section any affirmative grant of additional rights or powers either to the taxpayer, to the Board of Review, or to the courts.

C. A "negative pregnant" cannot ordinarily amount to an affirmative grant of powers. The effect of the negative pregnant is simply,—(as, ordinarily, the question

arises, in pleadings in actions at law),—to admit the existence or application of the ordinary general rule, except in so far as it is specifically denied by the language of the negative pregnant. It goes no further. It does not affirmatively create a new rule of the contrary tenor.

D. As applied to the present case, if there had been in effect a general rule, either pre-existing or created by some other general legislation, or created by other provisions of this Act allowing recourse to the courts or allowing appeals to the Board of Review and Equalization from tax determinations of the Treasurer generally,—or in cases other than those relating to deficiency taxes,—then the effect of the negative pregnant language in section 76(b) would have been to confine its limitations to the specific cases there mentioned and to leave the pre-existing (or otherwise existing) right of recourse to the courts, or of appeal to the Board, unaffected and still in existence. *But that is not the situation here.* Independently of this section 76(b) there is, clearly, no recourse to the courts and no appeal to the Board from the Treasurer's determinations of the correct amount of the tax, except in relation to deficiency taxes. There is, therefore, no general right of such recourse or appeal that could be left unaffected by the negative pregnant language of this statute. To the contrary, the general rule that is left so unaffected is the general rule that there is no such recourse to the courts and no appeal to the Board (except with relation to deficiency taxes), because none existed at common law, and none is otherwise granted by the statute.

Hence JUDGE MORTON was right in saying of this Section 76(b) in his dissenting opinion in this case (R. 41):

“At first reading it appears to be a limitation or restriction on suits for recovery of overpayments, already authorized elsewhere in the statute. It says in effect that no suit shall be maintained in any

court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review '*according to the provisions of law in that regard and the regulations established in pursuance thereof.*' The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which *have been paid.*" (*Italics are JUDGE MORTON'S.*)

E. It appears that, elsewhere in this Act, *the Legislature of Puerto Rico, when it desired to confer affirmative powers or rights upon the Board of Review and Equalization, or upon the courts, or the taxpayer, regularly employed direct positive affirmative language to that end, and did not leave its intent to be gathered from doubtful implication from negative pregnant phraseology.* Thus, in sections 57(a) and 62(b) [Appendix, *infra*, pp. 54,55], relating to deficiency taxes, the right of appeal to the Board of Review and Equalization is specifically given to the taxpayer by direct affirmative language; and, likewise, with relation to deficiency taxes, the right of appeal to the courts is specifically given to the taxpayer in direct affirmative unmistakable language by Section 76(a); Appendix, *infra*, p. 59. [It is agreed on all hands that Section 76(a) relates only to deficiency taxes: JUDGE BINGHAM, R. 31; JUDGE WILSON, R. 37; JUDGE MORTON, R. 41].

Point III

The limitations placed by the Income Tax Act of 1923 upon the jurisdiction of the Board of Review and Equalization with relation to income taxes are not enlarged or affected in any way by the earlier Act of August 2, 1923, amending sections 308, 310, and 313 of the Political Code with relation to the general powers of the Board.

With relation to income taxes, the later income Tax Act is a complete code in itself.

A. Sections 308, 310, and 313 of the Political Code, as amended by Act No. 75 of August 2, 1923 (Laws of 1923, pp. 604-608), are in the Appendix (*infra*, pp. 66-68). Respondent, in its "Brief in Opposition" heretofore filed herein, in opposition to our original petition for certiorari, contended (pp. 10-13) that those sections carry over, and operate to enlarge the powers, with relation to income taxes, given to the Board by the later Income Tax Act of 1925 here before us.

B. But that Act of 1923 *was enacted while the Income Tax Act of 1921 was in effect* (Act No. 43 of July 1, 1921, Laws of 1921, pp. 312-356).

C. Under the 1921 Act, *the taxpayer was not expected to pay his tax upon filing his income tax return*. On the contrary, that Act contemplated that, *in all cases*, the amount of the tax to be paid should be calculated and assessed by the Treasurer, some time after the taxpayer had made his return; and that the taxpayer was not expected to pay the tax until after it had thus been *assessed* by the Treasurer and notice of the amount thus assessed had been given to the taxpayer (Act of 1921, Secs. 19-26, 32, 38, 40, 41; Laws of 1921, pp. 334-346). So that, *in all cases*, there was an *assessment* by the Treasurer, and if the taxpayer objected to the assessment an appeal was provided for him to the Board of Review and Equalization (Act of 1921, Secs. 45-47; Laws of 1921, p. 348).

D. *It was in order to make the corresponding sections of the Political Code correspond to that scheme of assessment of the 1921 Income Tax Act*, in so far as the Board's duties related to income taxes, that the Legislature enacted the Act No. 75 of August 2, 1923, amending sections 308, 310, and 313 of the Political Code.

E. But that scheme for the payment of income taxes was revolutionized by the Income Tax Act of 1925, here involved.

Instead of the taxpayer being expected to wait before payment of the taxes until after his tax return had been examined by the Treasurer and the amount of the tax calculated and assessed and notification of the amount given to the taxpayer with a request for payment, this new Act of 1925 requires the taxpayer to make payment immediately, coincidentally with filing his tax return, of the amount calculated by himself; and contemplates that he will not receive any notice from the Treasurer at all, *unless* the Treasurer afterwards finds that the taxpayer has not paid as much as the "correct amount of the tax", as determined by the Treasurer on subsequent examination of the tax return; and that, in such cases of underpayment (or of failure to pay) the Treasurer shall assess a "*deficiency tax*" and notify the taxpayer of the amount of such "*deficiency tax*"; and then that the only office of the Board of Review and Equalization is to consider appeals from any such "*deficiency tax*" thus assessed by the Treasurer, to which a taxpayer may object.

That is an entirely new scheme, with which the former provisions for appeals to the Board, as contained in the 1921 Income Tax Act and in the 1923 amendments to the Political Code,—which, as above pointed out, were enacted in order to conform with the 1921 Act,—just do not fit at all.

F. The 1925 Act was not an amendment of the former 1921 Act; but was a complete new income tax code.

The 1925 Act is entitled:

"An Act to provide revenues for the People of Puerto Rico through the levying of certain income taxes, and for other purposes" (Laws of 1925, page 400).

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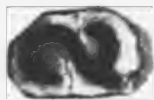
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and its first section provides:

"Section 1.—This Act shall be known as the 'Income Tax Act of 1924' " (Laws of 1925, page 400.)"

Furthermore, its Section 85 expressly provides (Laws of 1925, page 548):

"Section 85.—(a) Income Tax Law No. 43, approved July 1, 1921, as amended, is repealed as of January 1, 1924."

G. This new complete code, carrying this express repeal of the entire prior income tax system, necessarily superseded all contradictory provisions relating to the powers of the Board of Review and Equalization contained in the prior laws, whether in the 1921 Income Tax Act itself, or in the 1923 amendments of the Political Code which had been made in order to conform to the 1921 Act.¹⁷ [Or, perhaps, it might be more accurate to say, with relation to those sections of the Political Code, that, necessarily, they are impliedly amended by the later 1925 Act, so that the powers and jurisdiction of the Board, on appeals in income tax cases, are thereafter to be such,—(and such only),—as are provided in the 1925 Act.]

H. It follows that, since the enactment of the 1925 Act, which is the *later expression of the legislative will*, the powers and jurisdiction of the Board, with relation

¹⁶ Although not enacted until August 6, 1925. See *ante*, footnote 3, p. 10.

¹⁷ And so, *vice versa*, it has finally been held that the still later amendment of the *general tax laws* by the Act of 1927 concerning the time within which to begin suits for tax refunds, does not affect this Income Tax Act of 1925; because *this income tax act is a complete code in itself*, covering the law with relation to income taxes. (Confer, last paragraph of JUDGE WILSON's opinion in the Circuit Court of Appeals; R. 40).

income taxes, are those granted it by that 1925 Act; and, in relation to income tax cases, *are only those*; and are none others.

I. Whence it results that, as hereinbefore stated (Point I, *ante*, pp. 23-25), the jurisdiction of the Board of Review and Equalization in income tax cases is now limited to appeals relating to "deficiency taxes".

Point IV

It is particularly significant of the intent of the Legislature of Puerto Rico not to permit any recourse to the courts from the Treasurer's determination of the correct amount of the tax (or any appeal to the Board of Review and Equalization), except in relation to deficiency taxes, that, in drafting sections 75 and 76(b) of the Act of 1925, it entirely omitted provisions appearing in cognate sections of the earlier Puerto Rican Act of 1919, and of the federal Revenue Act of 1924, respectively, upon which these Sections 75 and 76(b) are otherwise closely modeled, and which would have permitted recourse to the courts from all tax determinations of the Treasurer, had the Legislature been fit to follow them in drafting this Act of 1925.

A. Section 75 of the Act of 1925 (Appendix, *infra*, p. 59) is quite closely modeled upon Section 66 of the earlier Act of 1919 (Act No. 80, Laws of Puerto Rico, 1919, pp. 612, 666; Appendix, *infra*, pp. 60-61), which had been repealed by the Act of 1921, repealing the entire 1919 Act. (Act No. 43, Section 63; Laws of 1921, pp. 312, 356; Appendix, *infra*, p. 61).

(1) *But the second paragraph of that Section 66 of the 1919 Act had gone on to provide,—in addition to its first paragraph which is substantially followed in Section 75 of the 1925 Act,—the following, in its second paragraph, expressly granting recourse to the courts from all tax determinations of the Treasurer under that 1919 Act:*

"That when proper claim has been made to the Treasurer of Puerto Rico for the return, reimbursement or remittal of any duties or taxes erroneously levied or collected, * * * if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice";

and, under that provision in the second paragraph of that section of the 1919 Act, the Supreme Court of Puerto Rico had held that, *because of that express legislative direction*, a taxpayer, even though he had paid voluntarily and without protest, might make his claim for refund to the Treasurer and if the Treasurer denied it "without reason" he might have his action in court against the Treasurer for the refund. *Serrallés vs. Treasurer*, 30 P. R. Rep. 220, 223-224; *McCormick vs. Treasurer*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440.

(2) But, as the Supreme Court of Puerto Rico pointed out in its opinion in *Compañía Agrícola de Cayey vs. Domenech, Treasurer, supra*, 47 P. R. Dec. 535, 539, quoted and followed in its opinion of July 23, 1936, in the *Fertilizer* case (Appendix III, *infra*, pp. 65-66), the entire Income Tax Act of 1919 was repealed by the repealing clause, section 63, *supra*, of the Income Tax Law of 1921 (Act No. 43, Laws of 1921, pp. 312, 356; Appendix, *infra*, p. 61), which repealed the entire 1919 Income Tax Law, substituting the 1921 Act as a complete new code in lieu thereof, and saving only the provisions of the earlier act "in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes."

(3) *The 1921 Act contained no provision whatever corresponding to section 66 of the 1919 Act, and no provision of any kind for the refund of income tax payments made voluntarily and without protest. The result*

was that, as the Supreme Court of Puerto Rico said in the *Compañía Agrícola de Cayey* case quoted in the July 23, 1936, opinion in the *Fertilizer* case (Appendix III, *infra*, pp. 65-66) :

“It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of lawsuit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a lawsuit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding.

(4) Then, four years later, the Income Tax Law of 1921 was repealed, in its turn, and this Act of 1925 was substituted for it. And this Act, by its Section 75 here involved, again provided,—but in different form,—a power in the Treasurer to refund to a taxpayer income tax payments mistakenly or unwittingly made voluntarily and without protest. But, as was pointed out by the insular Supreme Court in the *Compañía Agrícola de Cayey* case, and in its opinion of July 23, 1936, in the *Fertilizer* case (Appendix III, *infra*, pp. 62-66), following and quoting the *Agrícola de Cayey* case, and followed in the present case (R. 18, 23-24), the Legislature in restoring to the taxpayer, by Section 75 of the present code, the privilege of requesting the Treasurer to refund voluntary tax payments unwittingly made, *did not see fit to restore* the right formerly given to the taxpayer by the last paragraph of section 66 of the 1919 Act, as above quoted (*ante*, p. 30; Appendix *infra*, pp. 60-61), to resort to the courts in case the Treasurer

denied his claim "without reason". *That provision of the 1919 Act was not reenacted.* To the contrary, the Legislature in the present code enacted simply (Laws of 1925, at pp. 356-538; Appendix *infra*, p. 59).

"Section 75. The Treasurer is *authorized* to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; *and shall make report to the Legislature of Puerto Rico* at the beginning of each regular session of all transactions under this section" (*Italics supplied*);

and stopped there.

(5) *And then, as if to emphasize its intention not to permit action in the courts to review what the Treasurer has "determined" to be "the correct amount of the tax" (Sections 54, 55), nor to review any refusal of the Treasurer to change his "determination", nor his refusal to allow any further refund in favor of a taxpayer upon any request under section 75,—and to drive home the legislative purpose that there should be no resort whatever to the courts for any refund of income taxes or excess-profits taxes, (EXCEPT "deficiency taxes"), in accordance with the provisions of the mandatory system established by sections 54, 55, 64 and 75 of the Act,—the Legislature, by section 76(b) of the Act (Laws of 1925, at pp. 538-540; Appendix *infra*, p. 60) expressly provided:*

"(b) *No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or any pecuniary penalty . . . until a claim for refund or credit has been duly filed with the Treasurer and with the*

Board of Review and Equalization on appeal, *according to the provisions of law in that regard*¹⁸, and the regulations established in pursuance thereof". (*Italics supplied*)

In other words, that there should be no suit at law or other proceeding in court for the recovery of voluntary payments, nor in the nature of appeal from the Treasurer's action in denying any request made to him under Section 75 of the Act.

(6) *And the legislative intention is further driven home and emphasized* by the significant fact that the Legislature, in framing section 76(b) of this statute, followed, almost word for word, the phraseology of Section 3226 of the United States Revised Statutes as amended by Section 1014(a) of the federal "Revenue Act of 1924", the Act of Congress of June 2, 1924, c. 234, 43 Stat. 253, 343, *until the Legislature came down to the words "according to the provisions of law in that regard"*, in the federal Act (7th and 8th lines of sec. 3226, U. S. Rev. Stats., as amended by sec. 1014(a) of the Federal Revenue Act of 1924; 9th and 10th lines, as copied in Appendix II, *infra*, p. 61; first line at the top of the page in the Puerto Rican Act, in the Laws of Puerto Rico, 1925, p. 540); *but then stopped there*. Instead of copying the immediately following provision of the federal statute allowing suits in court for refund of voluntary payments even though made without protest, the Legislature of Puerto Rico *deliberately omitted that provision of the federal statute, and did not copy it nor put in any corresponding language at all*. The federal statute (Rev. Stats., Sec. 3226, as amended by section 1014(a) of the Federal Revenue Act of 1924; 43 Stat. 343; Appendix II, *infra*, p. 61),—immediately following

¹⁸ *Id est*, otherwise provided.

the word "regard",—goes on, "and the regulations of the Secretary of the Treasury established in pursuance thereof"; and then comes, in the federal statute, the clause which we have printed in **bold type** in Appendix II, hereto, *infra*, p. 61:

"but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

The omission of that language by the Legislature of Puerto Rico in drafting Section 76(b) of the Puerto Rican Act here in question was certainly not an oversight. It was plainly deliberate; plainly intended to drive home the intention of the Legislature of Puerto Rico not to follow the Congress in regard to the recovery of voluntary income tax payments not made under protest; and to drive home and emphasize the Legislature's intention, in restoring, by Section 75 of the present Act, a privilege analogous to that formerly given Puerto Rican taxpayers by Section 66 of the old 1919 Act, not to revive the right of access to the courts formerly given by the second paragraph of Section 66 of the 1919 Act in case of the Treasurer's denial of a taxpayer's request "without reason". That second paragraph of Section 66 of the 1919 Act was entirely omitted in framing Section 75 of the present code,—an omission which, again, was clearly deliberate, and was not an oversight.

(7) It results that, in view (1) of this deliberate action of the Legislature of Puerto Rico in omitting these clauses, both from Section 75 and from Section 76(b), in framing the present income tax code, and in view (2) of the established rule recently reiterated by this court in the *Moore Ice Cream Company* case that (*Moore Ice Cream Co. vs. Rose*, *supra*, 289 U. S. 373, 375-376):

"1. At common law . . . protest at the time of

payment was a condition precedent to the recovery of a tax. . . . The rule still persisted until 1924, when it was abolished by the Revenue Act of that year, with a *proviso* that pending suits should be unaffected by the change",

the common law rule is the rule still applicable in Puerto Rico, where no statutory change has been made by the Legislature, such as the Congress made in the federal statute by Section 1014 of the Federal Revenue Law of 1924. The rule is correctly applied by the insular Supreme Court in its decision in the present case, and in its earlier decisions which it followed here.

Point V

The opinions of the majority members of the Circuit Court of Appeals, Judges Bingham and Wilson, erred in failing to apply here the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed unless "clearly erroneous"; and further erred in failing to recognize that the decision of the Supreme Court of Puerto Rico in this case was, in any event, not "clearly erroneous", and, therefore, should have been followed, under this rule.

A. The decision of the insular Court in this case following the rule already established by it in the preceding cases of *Compañía Agrícola de Cayey Ltd.*, vs. *Domenech, Treasurer*, *supra*, 47 P. R. Dec. 535, and *Porto Rico Fertilizer Co.* vs. *Domenech, Treasurer*, 50 P. R. Dec. 405, decided July 23, 1936 (Appendix III, *infra*, pp. 62-66), falls within the established rule that the decision of a Territorial Supreme Court, such as the Supreme Court of Puerto Rico, construing a local statute of the Territory, will be followed, unless "clearly erroneous". This decision of the insular Court is certainly not "clearly erroneous"; but on the contrary is right and reasonable; and therefore under the established rule will not be disturbed. *Domenech vs. Verges*,

69 F. (2d) 714; *De Villaneuva vs. Villaneuva*, 239 U. S. 293, 289-299; *Cardona vs. Quinones*, 240 U. S. 83, 88; *Loiza Sugar Co. vs. People of Puerto Rico*, 57 F. (2d) 705, 706; *Porto Rico Coal Co. vs. Domenech*, 41 F. (2d) 183, 185; *Richardson vs. Fajardo Sugar Co.*, 237 Fed. 195, 196; *Russell & Co. vs. Sancho Bonet, Treasurer*, 92 F. (2d) 821.

B. On this point JUDGE MORTON was clearly correct in saying in his dissenting opinion in this case (R. 42), in relation to the holding of the Supreme Court of Puerto Rico:

"The Supreme Court accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, 'if the decision of the Treasurer is against him he cannot appeal from the same to courts of justice.' This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without protest may be reopened on claims for refund at any time within four years and resettled *de novo* in court proceedings. This is in fact what is approved by the decision in the *Yabucoa Sugar* case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."¹⁹

¹⁹ JUDGE WILSON (R. 37) declines to follow the insular Court's interpretation of this local statute because of "conflicting decisions" of that court. But, as hereinbefore (*ante*, footnote 12, p. 18) and hereinafter (*infra*, Points VI and VII, pp. 37-42) pointed out, there are no

Point VI

The decision of the insular Supreme Court was clearly right.

A. In relation to voluntary income tax payments made by a taxpayer upon filing his own income tax return under the 1925 Act, the "mandatory duties" of the Treasurer are simply: (1) To examine the return and to "determine the correct amount of the tax" (Sec. 54); and (2) If the Treasurer finds that the taxpayer has overpaid the amount which the Treasurer has thus "determined to be the correct amount" of the tax (or of an installment) then to credit or refund the amount of such overpayment *as thus determined by the Treasurer* (Secs. 55, 64).

B. In addition, if the taxpayer, at any time within four years [Sec. 64(b)], claims that he has mistakenly, —although voluntarily and without any protest,—made any overpayment, then the Treasurer is "authorized" to refund any amount which he may find to have been "erroneously or illegally assessed or collected" or to have been "unjustly assessed or excessive in amount, or in any manner wrongfully collected", and to "make report to the Legislature of Puerto Rico" of such refund (Sec. 75).

C. Of course that provision of Section 75 of the Act, that the Treasurer is "authorized" to make such refunds, means that a mandatory duty is imposed upon

such conflicting decisions, as to the questions here involved.

There was a conflict of decision on another point, viz., whether Act No. 8 of 1927 changed in any way the provisions of the Act of 1925 here involved. But, as JUDGE WILSON himself notes (R. 40) that question has now been "finally concluded" in the negative. It is not here. (There was also another question, not here involved, as to whether, with relation to "deficiency taxes", a second appeal to the board was necessary after the treasurer's final decision.)

him to hear and determine and to judge any such claims that may be presented to him; but that is the extent of his mandatory duty under that Section 75, viz., to hear and to determine and to judge.

If he performs that duty, if he accords the claimant a full and fair hearing, and regularly determines and judges the claim, then that is the end of it. The Legislature has provided no appeal from the Treasurer's decision on such a claim. The Treasurer, under Section 75 in connection with Sections 54 and 55, determines the "correct amount of the tax", and makes such refund, if any, as, upon such hearing under Section 75, he finds to be correct.²⁰

D. As the insular Supreme Court phrased it, in its opinion on rehearing in the *Fertilizer Company* case, July 23, 1936, in considering the powers and duties of the Treasurer under this Section 75 of the Act of 1925 (50 P. R. Dec. 405, 410-411, *Spanish Edition*; translation in Appendix III, *infra*, p. 62:

"The authorization cannot, in fact, be more ample. The Treasurer acts by himself. *He is called upon to judge the merits of each claim.* By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization." (*Italics supplied*)

²⁰ Doubtless, if the Treasurer refused a proper hearing under Section 75, or proceeded in an irregular manner, or refused refund of an amount which he had himself determined had been excessively collected above the "correct amount of the tax" determined by him under Section 54, then *mandamus* would lie to compel him to do his duty. But there is no suggestion in this record of any such abuse of the Treasurer's powers in the present case.

E. To "judge". That is the apt word to describe the Treasurer's powers under Section 75. He exercises *quasi-judicial power to hear and to determine*. That is the furthest removed from,—is, indeed, the exact antithesis to,—any uncontrolled or irresponsible or arbitrary power,—or to the indulgence of any "whim" of the Treasurer (JUDGE BINGHAM, R. 33).

Nothing is left to the Treasurer's "whim" or to any uncontrolled "discretionary" power; but, as the insular Supreme Court holds, the *quasi-judicial* duty is imposed on the Treasurer to **judge** the merits of each claim. He is bound by the rules of fair play applicable to all hearings and decisions by administrative tribunals, as well as to the superior courts; but the Legislature had the undoubted power to provide, as it did by the Act of 1925, that, after this full hearing has been awarded, and after the Treasurer has performed his duty "to judge the merits of the claim", and has thus judged and decided it, then the taxpayer has no appeal to the courts from the Treasurer's decision. It is final.²¹ [In the absence, of course, of any claim of irregularity in procedure, or of any abuse of that kind of the Treasurer's power. No such claim of irregularity is made in this record].

Point VII

The supposed confusion or contradiction, to which Judge Wilson adverts (R. 37), in decisions of the insular Supreme Court, does not exist with reference to the finality of the decision of the Treasurer upon a claim for refund of voluntary supposed overpayments. The decisions of the insular Supreme Court, on this question, are all in harmony with each other, and are clear and correct.

A.—By section 66 of the Puerto Rican Income Tax Act of 1919, the Treasurer was given authority to consider claims for, and to "remit, reimburse or make resti-

²¹ Point I, *ante*, pp. 22-23.

tution for" income taxes erroneously or unlawfully imposed or collected; but his decision was not made final. To the contrary, as above pointed out (*ante*, Point IV, pp. 30 *et seq.*), it was expressly provided that if the Treasurer "refuses without reason to grant such a claim", then "the aggrieved party may appeal to the courts of justice" (Act No. 80, Laws of Puerto Rico, 1919, p. 666; Appendix I, *infra*, pp. 60-61.

B.—In cases arising under that Act of 1919, the Supreme Court of Puerto Rico held that, *in view of that express provision of the Statute* allowing "the aggrieved party" an "appeal to the courts of justice", such an "appeal", in the form of an action in the appropriate insular district court for a tax refund, would lie at the suit of "the aggrieved party", the taxpayer, even though the original tax payment had been made voluntarily and without protest. *Serrallés vs. Treasurer*, *supra*, 30 P. R. Rep. 220, 223-224; *McCormick vs. Treasurer*, *supra*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440.

C.—By the Income Tax Law of 1921 (Act No. 43, Laws of Puerto Rico, 1921, pp. 312, 356; Appendix, *infra*, p. 61) the entire Act of 1919 was repealed by the repealing clause, Section 63 of the Act of 1921. The 1921 Act was substituted as a complete new code. This 1921 Act contained no provision corresponding to Section 66 of the former 1919 Act, and no provision of any kind for refunds of income tax payments paid voluntarily and without protest.

D.—In view of that repeal by the 1921 Act of the former provision of Section 66 of the 1919 Act, the Supreme Court of Puerto Rico held in the *Compañía Agrícola de Cayey* case, followed by that court in the present case, that (*as quoted ante*, p. 31) there no longer remained, from 1921 to 1925 [that is to say from the date of the enactment of the 1921 Act up until the enactment

of the 1925 Act], any authority anywhere in the Puerto Rican governmental establishment, either in the Treasurer or in anybody else, to make refunds of voluntary income tax payments paid without protest.

E.—By section 75 of the Income Tax Act of 1925, authority was again given to the Treasurer to consider such claims, and to make such refunds, and to report his actions to the Legislature. But this authority was given in somewhat different form from that given by Section 66 of the former 1919 Act, and the provision contained in Section 66 of the 1919 Act permitting the taxpayers recourse to the courts from the Treasurer's decisions on claims for such refunds, *was entirely omitted* from Section 75 of the 1925 act. And, as above pointed out (*ante*, pp. 31-35) *that omission was manifestly deliberate and purposeful on the Legislature's part.*

F.—Under those circumstances, and in view of that legislative history, and of the deliberate omission by the Legislature from Section 75 of the 1925 Act of the provision which it had put into the corresponding Section 66 of the earlier 1919 Act, the Supreme Court of Puerto Rico following its decision in the *Compañía Agrícola de Cayey* case *supra* (*Compañía Agrícola de Cayey vs. Treasurer*, 47 P. R. Dec. [*Spanish ed.*] 535, 538-540), held on rehearing, July 23, 1936, in the *Porto Rico Fertilizer Company* case, *supra* (50 P. R. Dec., *Spanish ed.*, 405, 410-414; translation in Appendix III, *infra*, pp. 62-66),—and followed and adhered to it in the present case,—that as above quoted (*ante*, p. 15),

“As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest.” He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said

tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice."

G. As we have said, the decisions of the Supreme Court of Puerto Rico upon this point are plain and free from confusion.

They are in harmony with each other. They clearly trace the development of the legislation. They are reasonable. They are all unanimous. The power which they hold that the Legislature exercised, to make the determinations of the Treasurer final under Section 75 of the 1925 Act, is clearly a power within the legislative authority vested in the Legislature of Puerto Rico by the Organic Act of the Congress, by which that Legislature has been invested in such matters with powers "nearly, if not quite, as extensive as those exercised by the State legislatures". *Puerto Rico vs. Shell Co.*, *supra*, 302 U. S. 253, 262 [And *confer ante*, Point I, pp. 22-23].

H. Under these circumstances, there should be accorded to these unanimous and harmonious decisions of the Supreme Court of Puerto Rico the respect regularly accorded by the established rule to decisions of a Territorial Supreme Court interpreting local Territorial statutes.

Point VIII

The Treasurer's Regulations have nothing to do with this case.

Respondent, in the latter part of its Point "Second" of its "Brief in Opposition" heretofore filed in this case, quoted (at pp. 19-21), regulations promulgated by the insular Treasurer (a predecessor of the present Treasurer), on May 17, 1926, and claimed that they have a controlling effect here. Those are the same regulations to which reference was made by JUDGE BINGHAM in his opinion in the Circuit Court of Appeals (R. 32-33), as

above noted (*ante*, p. 16; footnote 9), and to which neither of the other Judges of the Circuit Court of Appeals, nor the insular Supreme Court, paid any attention.

A. Aside from the fact that this is not a case of supporting any long-established administrative practice embodied in a rule of any administrative officer, or acted upon and enforced by the administrative officer in question and by the local courts,—*but the exact contrary*, because, here, *the Treasurer did not consider these regulations applicable, and did not apply them*, and the local courts likewise disregarded them and supported the action of the Treasurer here,—*these regulations*, on their face, *do not apply to this case*.

B. Respondent's counsel quoted and relied on Article 355 of the Regulations of May 17, 1926. On its face, its applicability hinges upon the first seventeen words of its sub-paragraph "(1)", which read, as Respondent quoted them:

"(1) When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: ***".

Then follow the several things that the taxpayer may do. But it all hinges on the taxpayer having thus received "*notice from the Treasurer that the income tax has been determined*". [Sub-paragraph ("2") follows along, after that original "*notice*" contemplated by sub-paragraph "(1)"].

C. Plainly, on its face, the language of that Regulation is a "hangover" from the language of some prior regulations that had been promulgated under the prior Income Tax Law of 1921, and were suitable to that law, under which, as hereinbefore pointed out (*ante*, pp. 26-27), the taxpayer was not required nor expected to make any payment at the time he filed

his income tax return, but only after having, later on, received notice from the Treasurer that, as this Regulation phrases it, "the income tax has been determined".

The draftsman of this Regulation, issued the following Spring after the enactment of the new 1925 Income Tax Act, had apparently not completely grasped the revolutionary character of the change in the system of payment of income taxes contemplated by the new 1925 Act [*confer, ante*, pp. 27-29], and failed fully to adapt the language of the Regulation to the new system contemplated by the 1925 Act. But, in any event, taking the language of the Regulation just as it stands, and attempting to fit it in to the provisions of the 1925 Act, this language of the Regulation can, on its face, properly apply only to cases of "deficiency taxes".

D. Under the 1925 Act, it is only in the case of assessment of "deficiency taxes" that the taxpayer "receives notice from the Treasurer that the income tax has been determined", within the language of this Regulation as above quoted. That language of the Regulation aptly describes the notice of the assessment of deficiency taxes, which the Treasurer is required to send to the taxpayer by registered mail, under section 57(a) of the 1925 Act (Appendix, *infra*, p. 54). And, upon receipt of such "notice", the taxpayer actually does have, under the 1925 Act, substantially the elections that are stated in this Regulation as quoted in Respondent's Brief in Opposition (pp. 19-20).

E. But, under the 1925 Act, all of that language of the Regulation necessarily applies only to "deficiency taxes". All of this, by its own express wording, relates only to

what the taxpayer may do *after* he has received this "notice", under section 57(a) of the Act.²²

F. Hence, in the present case, which does not relate to "deficiency taxes",—nor to any taxes paid after the taxpayer had received any kind of a "notice" from the Treasurer,—but relates, on the contrary, wholly to taxes voluntarily paid, under the Act of 1925, coincidentally with filing the taxpayer's income tax return and in accordance with the amount shown due by the taxpayer itself upon the face of its own return,—the insular courts were correct in disregarding this regulation, as did also JUDGES WILSON and MORTON in the Circuit Court of Appeals.

Point IX

The opinions of the majority Judges of the Circuit Court of Appeals erred in overlooking or ignoring the *second* or "*subsidiary*" question presented on the record in this case. ("Questions Presented", *ante*, p. 3).

If, as petitioner believes to be clear, no right of appeal is given by the statute to the Board of Review and Equalization from the Treasurer's determination of the "correct amount of the tax" in any cases other than those relating to deficiency taxes, then it follows that the Board of Review had no jurisdiction to entertain the second appeal to that Board taken by the plaintiff sugar company here from the Treasurer's determination of the tax on March 28, 1930, allowing a refund of \$525.56, but not allowing more (R. 6; *ante*, pp. 11-12); and there-

²² Under the prior 1921 act, as above pointed out (*ante*, pp. 26-27), the taxpayer received this "notice" before he was required or expected to make any tax payment at all; and hence the "notice" applied,—and this language of the Regulation (or substantially the same language under prior regulations) was, therefore, properly applicable,—to all income taxes; instead of, as under the present 1925 Act, only to "deficiency taxes".

fore that the Treasurer was not bound in any way by the decision of the Board on that second appeal (or by the decision on the first appeal in so far as it purported to do more than to disallow the deficiency tax); and, hence, that the plaintiff's "Amended Complaint" is fatally defective, and states no cause of action, and that the demurrer to it was properly sustained, because *it contains no allegation upon which any conclusion can be based concerning the correctness, in fact, of the Treasurer's determination, or of that of the Board, or of the original calculation of the sugar company itself upon which it made its own voluntary tax payment upon its own original tax return, as to the item of "Repairs" for its fiscal year 1926, involved in the calculation, by the respective different parties, of the "correct amount of the tax", as alleged in the "Amended Complaint" (R. 2-8). The Amended Complaint relies solely upon the assumption that the Treasurer was bound by the Board's decision, and "disobeyed it" (Par. XIII, R. 6).*

As to this point, therefore, JUDGE MORTON was correct in saying in his dissenting opinion (R. 42-43):

"In the Sugar Company case the claim for refund rested on changes in income or deductions made by the taxpayer after the tax had been voluntarily paid. They were not approved by the Treasurer. It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it."

CONCLUSION

The unanimous decision of the Supreme Court of Puerto Rico, in accord with its decisions in the earlier *Fertilizer* case and in that of *Compañía Agrícola de Cayey, Ltd., vs. Domenech, Treasurer*, with which JUDGE MORTON agreed in substance in his dissenting opinion in

the Circuit Court of Appeals, was right, and should be affirmed; and the judgment of the Circuit Court of Appeals, entered upon the majority opinions of PRESIDING JUDGE BINGHAM and JUDGE WILSON, vacating that of the Supreme Court of Puerto Rico, was wrong and should be reversed.

Respectfully submitted,

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APPENDIX

APPENDICES

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APPENDIX I

Pertinent Sections of Puerto Rican "Income Tax Act of 1924"; Act of August 6, 1925; Laws of 1925, pp. 400, 512, 526, 536-540.

PAYMENT OF INDIVIDUAL'S TAX AT SOURCE

Section 22.—(a) All persons, in whatever capacity acting, including lessees or mortgagors or real or personal property, fiduciaries, employers, and all officers and employees of The People of Porto Rico having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, commissions, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any non-resident individual not a citizen of Porto Rico, or of any partnership not engaged in trade or business within Porto Rico and not having any office or place of business therein and composed in whole or in part of nonresident individuals not citizens of Porto Rico (other than income received as dividends of the class allowed as a credit by subdivision (a) of section 18) shall (except as otherwise provided in regulations prescribed by the Treasurer under section 19) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 6 per centum thereof; *Provided*, That the Treasurer may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

(b) Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15 pay the tax to the official of The People of Porto Rico authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

(c) Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient or such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(d) If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; or in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

Section 23.—(b) If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Treasurer, who shall redetermine the amount of the tax due under Parts I and II of this title for the year or years affected, and the amount of tax due upon such redetermination, if any, shall be paid by the taxpayer upon notice and demand by the Treasurer, or the amount of tax over-paid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 64. In the case of such a tax accrued but not paid, the Treasurer as a condition precedent to the allowance of this credit may require the taxpayer to give a bond with sureties satisfactory to and to be approved by the Treasurer in such sum as the Treasurer may require, conditioned upon the payment by the tax payer of any amount of tax found due upon any redetermination; and the bond herein prescribed shall contain such further conditions as the Treasurer may require.

TIME AND PLACE FOR FILING INDIVIDUAL AND FIDUCIARY RETURNS

Section 27.—(a) Return (except in the case of non-resident individuals not citizens of Porto Rico) shall be

made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. In the case of a nonresident individual not a citizen of Porto Rico returns shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of June. The Treasurer may grant a reasonable extension of time for filing returns if application therefor is made before the date prescribed by law for filing the returns, whenever in his judgment good cause exists, and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than ninety days.

CORPORATION OR PARTNERSHIP RETURNS

Section 37.—(a) Every corporation or partnership subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer, or by a managing partner or any other person empowered to do so. If any foreign corporation has no office or place of business in Porto Rico, but has an agent in Porto Rico, the return shall be made and sworn to by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations or partnerships, such receivers, trustees, or assignees shall make returns for such corporations or partnerships in the same manner and form as corporations or partnerships are required to make returns. Any tax due on the basis of such returns made by receivers, trustees in bankruptcy or assignees shall be

collected in the same manner as if collected from the corporations or partnerships of whose business or property they have custody and control.

TIME AND PLACE FOR FILING CORPORATE OR PARTNERSHIP RETURNS

Section 39.—(a) Returns of corporations or partnerships shall be made at the same time as is provided in subdivision (a) of section 27, except that in the case of foreign corporations not having any office or place of business in Porto Rico returns shall be made at the same time as provided in section 27 in the case of a nonresident individual not a citizen of Porto Rico.

(b). Returns shall be made to the Treasurer.

PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES

Date on Which Tax Shall be Paid

Section 53.—(a) Except as provided in subdivisions (a) and (c) and (d) of this section the total amount of tax imposed by this title shall be paid—

(1) In the case of a taxpayer, other than a nonresident individual not a citizen of Porto Rico, and other than a foreign corporation not having an office or place of business in Porto Rico, on or before the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the third month following the close of the fiscal year; and

(2) In the case of a nonresident individual not a citizen of Porto Rico, and of a foreign corporation not having an office or place of business in Porto Rico, on or before the fifteenth day of June following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on or before the fifteenth day of the sixth month following the close of the fiscal year.

(b) (1) The taxpayer may elect to pay the tax in two equal installments, in which case the first installment shall be paid on or before the latest date prescribed in subdivision (a) for the payment of the tax by the taxpayer, and the second installment shall be paid on or before the fifteenth day of the sixth month after such date.

(2) If any installment is not paid on the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from Treasurer.

EXAMINATION OF RETURN AND DETERMINATION OF TAX

Section 54.—As soon as practicable after the return is filed the Treasurer shall examine it and shall determine the correct amount of the tax.

OVERPAYMENTS

Section 55.—If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 64.

DEFICIENCY IN TAX

Section 56.—As used in this title the term “deficiency” means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax;
or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

Section 57.—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the Treasurer. No part of the amount determined as a deficiency by the Treasurer but disallowed as such by the Board shall be assessed, but a proceeding in a district court of competent jurisdiction may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX

Section 60.—(a) Except as provided in section 61 and in subdivision (b) of section 57 and in subdivision (b) of section 62—

(1) The amount of income and excess-profits and the amount of income taxes imposed by this Act or by Income Tax Act No. 59, of 1917, Income Tax Act No. 80 of 1919, Income Tax Act No. 43 of 1921, or by any of said Acts, as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

CLAIMS IN ABATEMENT

Section 62.—(b) If a claim is filed as provided in subdivision (a) of this section the Treasurer shall by registered mail notify the taxpayer of his final decision on the claim. The taxpayer may within 30 days after such notice is mailed file an appeal with the Board of Review and Equalization. If the claim is denied in whole or in part by the Treasurer (or by the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the Treasurer, and the amount, the claim for which is allowed, shall be abated. A proceeding in court may be begun for any part of the amount claim for which is allowed by the Board. Such proceedings shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 60 has expired.

CREDITS AND REFUNDS

Section 64.—(a) Where there has been an overpayment of any income or excess-profits tax imposed by this

Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment shall be credited to any income or excess-profits tax then owed by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision of any amendment thereof, and any balance of such excess shall be immediately reimbursed to the taxpayer.

(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Treasurer, and such decrease is due to the fact that the taxpayers failed to take adequate deductions in previous years, with the result that there has been an overpayment of income or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing

of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) has expired.

(d) Where there has been an overpayment of tax under section 22 or 35 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(c) This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

CLOSING BY TREASURER OF TAXABLE YEAR

Section 65.—(a) If the Treasurer finds that a taxpayer designs quickly to depart from Porto Rico or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current rent unless such proceedings be brought without delay, the Treasurer shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this

section the finding of the Treasurer, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.

(b) A taxpayer who is not in default in making any return or paying income or excess-profits tax under any Act of the Legislature of Porto Rico may furnish to The People of Porto Rico, under regulations to be prescribed by the Treasurer, security approved by the Treasurer, that he will duly make the return next thereafter required to be filed and pay the next thereafter required to be paid. The Treasurer may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this section, provided the taxpayer has paid in full all other income or excess-profits taxes due from him.

(c) If security is approved and accepted pursuant to the provisions of this section and such further or other security with respect to the tax or taxes covered thereby is given as the Treasurer shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such respective taxes.

(d) In the case of a citizen of Porto Rico about to depart from Porto Rico, the Treasurer may, at his discretion, waive any or all of the requirements placed on the taxpayer by this section.

(e) No individual not a citizen of Porto Rico shall depart from Porto Rico unless he first procures from the Treasurer a certificate that he has complied with all the obligations imposed upon him by the income and excess-profits tax laws.

(f) If a taxpayer violates or attempts to violate this section there shall, in addition to all other penalties, be

added as part of the tax 25 per centum of the total amount of the tax or deficiency in the tax, together with interest at the rate of 1 per centum a month from the time the tax became due.

RULES AND REGULATIONS

Section 68.—The Treasurer is authorized to prescribe all needful rules and regulations for the enforcement of this Act.

REFUNDS

Section 75.—The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Porto Rico at the beginning of each regular session of all transactions under this section.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Porto Rico.

Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence, and the hearing shall be set promptly for final decision.

If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board

for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of Porto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Section 66, Act No. 80, approved June 26, 1919, "Income Tax Law of 1919"; Laws of Puerto Rico, 1919, pp. 612-672:

REFUND OR ABATEMENT OF TAXES

Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without

legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act.

Section 63, Act No. 43, approved July 1, 1921, "Income Tax Law of 1921"; Laws of Puerto Rico, 1921, pp. 312-356:

Section 63.—That all laws or parts of laws in conflict herewith are hereby repealed; but the provisions thereof shall continue in force as regards the levying and collection of all taxes accrued thereunder, and for the levying and collection of all fines imposed or that may be imposed in connection with said taxes.

APPENDIX II

Section 1014 of Federal "Revenue Act of 1924", Act of June 2, 1924, c. 234, 43 Stat. 253, 343.

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. * * * *

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act."

APPENDIX III

PORTO RICO FERTILIZER COMPANY vs. MANUEL U. DOMENECH,
TREASURER

Pertinent portion of opinion of Supreme Court of Puerto Rico on Rehearing, July 23, 1936 [CHIEF JUSTICE DEL TORO], 50 P. R. Dec. 405, 410-414; translation appearing in the printed transcript of the record (pp. 27-32) in that case on its appeal to the Circuit Court of Appeals, First Circuit, No. 3274 in that Court.

Section 75 of said law authorizes the Treasurer to remit, refund and return any taxes erroneously or illegally assessed or collected and penalties collected without authority, and any tax that appears to have been unjustly levied or for an excessive amount or for any reason erroneously collected.

The authorization cannot, in fact, be more ample. The Treasurer acts by himself. He is called upon to judge the merits of each claim. By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization.

The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasury shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalization stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the

Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76(a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

“(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.”

Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is affirmed by the Board a claim for refund ~~has~~ to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th last.

Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the legislator. Why such duplicity? If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?

This court had already said in the case of *American Colonial Bank of Porto Rico vs. Domenech, Treasurer*, 43 D. R. R. 889, 891. "We also agree with appellant that, if after appealing to the Board of Review and Equalization a taxpayer pays under protest, it is not necessary, once payment is made, to resort to said Board. The legislative intent was to grant a cause of action after payment under protest. Nevertheless, when drafting the said opinion in this case, our previous opinions were overlooked and when our attention was called to that oversight a reconsideration was granted and the case was reopened for a new discussion and decision of the issues of the same.

It is therefore clear that when the taxpayer, feeling aggrieved by the income tax levied by the Treasurer, files his claim with said official and his claim is denied and he appeals to the Board, which also decides the case against him, and he then pays under protest, he may, within the term of thirty days fixed by Law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any other preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of jus-

tice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice, availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compañía Agrícola de Cayey vs. Domenech, Treas.*, 47 D. P. R. 535, 539, as follows:

"It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919

is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serrallés vs. Treasurer*, 30 P. R. R. 220, and *McCormick vs. Bonner*, 44 D. P. R. 432, cited by the *amicus curiae*, are not applicable because they are based on the repealed law of 1919.

Therefore, under any phase that the case is considered the judgment appealed from should be affirmed.

APPENDIX IV

Political Code, Sections 308, 310 and 313, as amended by Act of August 2, 1923 (Laws of 1923, pp. 604-608).

Section 308.—For the purpose of revising the assessment and reassessment of real and personal property as provided by this Title, and for the purpose of passing on all claims made by taxpayers in respect to the assessment of their properties and the levying of property and income taxes, there shall be in the Department of Finance a permanent Board of Review and Equalization with an open office, to be composed of the Treasurer of Porto Rico and four persons versed in matters pertaining to the levying of taxes in Porto Rico, two of whom shall be agriculturists. Two additional members of the Board of Equalization and Review shall be elected at the next general election in the manner in which two Public Service Commissioners are at present elected, and the Commissioners so elected, together with the other five who are appointed, shall finally form the board, which up to that time shall be composed of the five appointed members. These persons shall be appointed by the Governor, with the advice and consent

of the Senate of Porto Rico, and shall hold office for two years, or until their successors shall have been appointed and shall have qualified, and they shall receive compensation at the rate of ten (10) dollars for each day's attendance at meetings of the board, and actual cost of transportation necessarily incurred. Each member of said board shall take an oath fairly and impartially to pass upon questions coming before them according to law. Any three members shall constitute a quorum. The Treasurer shall be *ex-officio* chairman of said board. The Public Service Commissioners of all the municipalities of the island may attend the meetings of the Board, and shall have a voice therein when so required in such cases as may relate to appeals from assessments of property located in their respective municipalities.

Section 310.—Said Board of Review and Equalization shall meet in regular session in the months of January, May and September of each year, and in special session at such other times as may be necessary in the opinion of the chairman. At said meetings the board shall hear appeals received and shall decide questions arising before the board relative to the greater or lesser amount at which property may be assessed for the purpose of taxation, or to the amount of taxes, or to exemptions from taxations, or to fix the income tax of any taxpayer; and upon recording such determination, the board shall correct returns, and liquidate taxes to be levied on income returns filed, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may be proper. Said board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, whether or not complaint has been made in connection therewith, and to decide all other complaints in regard to the levying of property and income taxes, and to correct all errors as such errors are brought

to its attention. For just cause the board may also reconsider, at its discretion and in its judgment, any decision made by it when so requested by a taxpayer within the unextendable term of thirty days counting from the date of service of notice. In performing the duties imposed on it by this Title, said board may examine, under oath or affirmation, any person who may have knowledge or information concerning the value of property subject to taxation, and any member of the board may administer the oath or affirmation.

Section 313.—The said Board of Review and Equalization shall return to the Department of Finance all returns, income tax returns, books, schedules and papers received or used by it in its work of correction and revision. The Treasurer shall furnish said board such assessors or inspectors as it may need in its investigations, as well as such books and documents as may be necessary for the proper performance of the duties of said board.

MAR 8 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,

Petitioner,

VS.

YABUCOA SUGAR COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

I.

Preliminarily: "Questions Presented".

1.—Respondent restates (*Brief*, p. 3) mistakenly the "Questions Presented".

The only questions really here presented on this record are those stated in the brief for petitioner (pp. 2-3), viz.:

(a) Whether a taxpayer may maintain an action in court, in the nature of an appeal from the Treasurer's determination of the "correct amount of the tax" under the Income Tax Law of Puerto Rico, against the Treasurer, for a refund of supposed overpayments of income

taxes paid voluntarily and without protest in accordance with the taxpayer's own income tax return; and

(b) Whether the Board of Review and Equalization has any jurisdiction to review and to bind the Treasurer by its decision on such a question of voluntary payment made without protest.

2.—Involved also, is, as Respondent agrees (*Brief*, p. 3) the question whether the decision of the Supreme Court of Puerto Rico is so "clearly wrong" as to deprive it of the respect paid, under the established rule, to the decision of a local Territorial Supreme Court interpreting a local Territorial statute.

II.

"Contentions of Respondent" (*Brief*, pp. 4-6).

1.—Respondent's "Contentions" numbered "(2)", "(3)", and "(4)" are beside the mark. Petitioner has raised no question in relation to that numbered "(2)".

As to "(3)" and "(4)", the defendant Treasurer demurred to the complaint on two grounds (R. 6) viz.: (1) That it did not allege that the tax had been paid under protest; and (2) "*Because the Complaint does not state facts sufficient to constitute a cause of action*".

The District Court sustained the demurrer, referring in its opinion only to the first ground stated by the Treasurer, without finding it necessary to discuss the second ground. The Supreme Court of Puerto Rico affirmed the decision. It seems strange doctrine to say that the Treasurer, in support of the decision in his favor, may not rely upon any ground stated in his demurrer, whether or not it was specifically discussed in the decision of the court in his favor; or to say that, in such a state of the pleadings,

"the burden was on the Treasurer to raise questions of fact by answer" (*Respondent's Brief*, p. 6). JUDGE MORTON properly called attention to this question appearing on the face of plaintiff's own complaint, when he said, in his opinion in the Circuit Court of Appeals (R. 36):

"It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it."

2.—Under its heading "Nature of the Action" (*Brief*, p. 2), respondent mistakenly criticizes our statement (*Petitioner's Brief*, p. 1) of the nature of the action. Petitioner did not say, as respondent mistakenly thinks, that this action is technically an "appeal" from the Treasurer's decision; but said, *correctly*, (*Petitioner's Brief*, p. 1),

"an action, practically in the nature of an appeal from the insular Treasurer's decision".

III.

Respondent expressly concedes (*Brief*, "Third", p. 16) the correctness of our Point I (*Petitioner's Brief*, pp. 22-23) that the Legislature was not obligated to provide any remedy by suit in court for taxpayers claiming to have made overpayments of taxes voluntarily and without protest.

But respondent attempts to avoid the force of this concession (and of the established rule on which it is based) by contending (*Brief*, "Second", pp. 12-15) that if the power of the Treasurer to determine "the correct amount of the tax" under sections 54, 55, 64, and 75 of the Act "is a discretionary matter in the Treasurer" (*Insular Supreme Court's opinion of March 17, 1937*, R. 21), then, as respondent now contends (*Brief*, p. 13)

“the Legislature has delegated its *legislative power* to the Treasurer and this it cannot do, as no such authority is conferred on the Legislature by the Organic Act”. (*Italics supplied*)

In other words, that it is a delegation of legislative power to an executive officer. In support of this, respondent cites and quotes (*Brief*, pp. 13, 14-15) *United States vs. Laughlin*, 249 U. S. 440, 443.

But respondent fails to notice that, in the *Laughlin* case, this court was dealing wholly with a determination by the Secretary of the Interior of a *pure question of law*, and not at all, as in the present case, with a question of fact. In the *Laughlin* case this court, immediately following that portion of its opinion which is quoted in respondent's brief, proceeded to say (249 U. S., at p. 443):

“In our view it was the intent of Congress that the *Secretary should have exclusive jurisdiction to determine disputed questions of fact*, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not in dispute and were shown to the Secretary's satisfaction; whether, as a matter of law, they made a case of excess payment, entitling claimant to repayment under the act of 1908, was a matter properly within the jurisdiction of the Court of Claims”. (*Italics supplied*)

In the *Laughlin* case the effect of upholding the Secretary's decision would have been to say that the Secretary might change the price of public lands to \$2.50 an acre, despite the act of Congress directing their sale at \$1.25 an acre. In other words, to delegate legislative power to the Secretary, in effect, to change the act of Congress.

No such question is here presented. The question here, upon which the various parties concerned, the Company itself, the Treasurer, and the Board of Review and Equal-

ization, differed, was a question of fact, *viz.*, as to how much of the Company's "repairs" made during the year 1926 were strictly current "repairs" for which it was entitled to take credit as current expenses of the business, and how much were really in the nature of permanent "improvements" (*Complaint*, Pars. VII, VIII; R. 4).

The clear meaning, and limitations, of the opinion in the *Laughlin* case are stated by this court in the later *Babcock* and *Dismuke* cases cited in our brief (*Brief for Petitioner*, p. 22).

In the *Babcock* case (*United States vs. Babcock*, 250 U. S. 328, 331) it is pointed out that the "general rules" are "well settled", *viz.*:

- (1) "That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts"; and
- (2) "That where a statute creates a right and creates a special remedy, that remedy is exclusive".

With reference to the *Laughlin* case, MR. JUSTICE BRANDEIS says, in the opinion in the *Babcock* case, after laying down the "general rules" as above quoted (250 U. S., at p. 331):

"Still the fact that the right and the remedy are thus intertwined might not, if the provision stood alone, require us to hold that the remedy expressly given excludes a right of review by the Court of Claims, *where the decision of the special tribunal involved no disputed question of fact and the denial of compensation was rested wholly upon the construction of the act*". (*Italics supplied*)

The same limitation upon the meaning of the *Laughlin* case is reiterated in the *Dismuke* case, *supra*, where this

court, after stating the general rule that (*Dismuke v. United States*, 297 U. S. 167, 172):

"If the statutory benefit is to be allowed only in his" [the administrative officer's] "discretion, the courts will not substitute their discretion for his. . . . If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein v. United States*, . . . ; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabauda Societa v. Elting*, 287 U. S. 329, 330, 331,"

adds (*ibid.* at p. 172)

"But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

citing the *Laughlin* case, and other earlier cases.

The rules are well established, and are plain. Under them the Legislature of Puerto Rico clearly had the power to make the administrative determination of the executive officer, the Treasurer, final, as to disputed questions of fact, such as that here involved; as indeed the respondent itself expressly concedes (*Brief*, "Third", p. 16). That was what the Legislature plainly and emphatically intended (*Petitioner's Brief*, pp. 29-34); and the insular Supreme Court unanimously so held.

IV.

1.—Respondent is mistaken in saying that the Supreme Court of Puerto Rico held "that the provisions of sections 76(a) . . . are applicable" and that "all three Judges of

Circuit Court of Appeals" as well as this petitioner himself "disagree" with the Supreme Court in this.

The record shows that the Supreme Court of Puerto Rico did not hold section 76(a) applicable here on this petition to the Treasurer for refund of supposed voluntary overpayment of income taxes; but, to the contrary, held section 75 to be the section applicable, with which the court wholly agree. The court said (R. 20-21): "Under section 75 * * * the Treasurer is authorized * * *".

In the Circuit Court of Appeals, JUDGE MORTON agreed, we do, with the insular Supreme Court, that the case is governed by section 75, in connection with sections 54, 55, and 64. JUDGES BINGHAM and WILSON thought they found in section 76(b) authority for (1) appeal to the Board of Review and (2) authority for recourse from the Treasurer to the courts.

Everyone agrees that section 76(a) has nothing to do with this case. Section 76(a) relates solely to deficiency taxes (*Brief for Petitioner*, pp. 7-9, 15-18).

~~Respondent~~ contends (*Brief*, p. 11, *et seq.*) that the decision of the Supreme Court of Puerto Rico, as well as the opinion of JUDGE MORTON, and petitioner's position there, would make section 76(b) "mean nothing".

But that is far from correct. As we have already pointed out (*Brief for Petitioner*, "Point IV", pp. 29-35) section 76(b) was enacted by the Legislature for a very important purpose, viz., that of emphasizing and driving home the legislative intent that there should be no recourse to the courts from decisions of the Treasurer under section 75 on petitions for refund of supposed overpayments of taxes made voluntarily and without protest or objection of any kind.

As was pointed out in the opinion of this court in the *Babcock* case, *supra* (*United States vs. Babcock*, 250 U. S. 328, 331), this, in itself, may be a very important legislative purpose. As this court there said with relation to the statute before the court in that case,

“These words clearly express the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final.

V.

It is believed that other matters are sufficiently covered in our original *Brief for Petitioner*. As there said, the judgment of the Circuit Court of Appeals, entered upon the majority opinions of PRESIDING JUDGE BINGHAM and JUDGE WILSON should be reversed, and in accordance with the dissenting opinion of JUDGE MORTON, the judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

vs.

YABUCOA SUGAR COMPANY,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL
MEMORANDUM

*To the Chief Justice and the Associate Justices of the
Supreme Court of the United States.*

In reply to respondent's supplemental memorandum being filed to-day by leave of court after the argument we venture here to sum up essential points of petitioner's argument:

1. The Legislature, in providing taxpayers a remedy for recovery of voluntary supposed overpayments of income taxes by petition to the Treasurer under section 75 of the Act, was under no obligation to provide any recourse to the courts from the Treasurer's decision of the

"correct amount of the tax". *United States v. Babcock*, 250 U. S. 328, 331; *Dismuke v. United States*, 297 U. S. 167, 171-172. (This we understand to be really conceded; despite respondent's discussion of the *Laughlin* case in its brief and its supplemental memorandum filed to-day). The question is: What was the intention of the Legislature?

2. The following are *indicia* of the intent of the Legislature to make the Treasurer's decision final:

(a) That intent harmonizes with the general scheme of the Act. The taxpayer is to make his own income tax return, and, without waiting for any notice, is to pay the amount that he himself calculates as the tax (Secs. 24-27, 37-45, 53; "Brief for Petitioner", p. 4). The Treasurer is then to examine the return and to "determine the correct amount of the tax" (Sec. 54); and, in case he finds that the taxpayer has overpaid the amount which the Treasurer has thus "determined" to be "the correct amount of the tax", then that amount is to be credited or refunded to the taxpayer (Secs. 55, 64). And a taxpayer at any time within four years [Sec. 64(b)] may petition the Treasurer; and the Treasurer, under section 75, "is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected", and to report his actions to the Legislature; i.e., to refund all collections in excess of what the Treasurer thus "determines" under these sections 54, 55, 64, and 75 to be "the correct amount of the tax".

(b) Finality of the Treasurer's decision under those sections is in accord with the "general rules" which this court in the *Babcock* case said are "well settled" (*United States v. Babcock*, *supra*, 250 U. S. 328, 331), viz.:

- (1) "That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts"; and

(2) "That where a statute creates a right and creates a special remedy, that remedy is exclusive".

(c) If the Legislature had intended that the settlement of the insular revenues should be tied up by possibly long litigation in the courts in the nature of appeals from the Treasurer's "determination" of the "correct amount of the tax" upon claims for refund of voluntary supposed overpayments, then it would scarcely have allowed so long a period as *four years* [Sec. 64(b)] for presenting such claims, in the face of the fact that it was expressly limiting to the short period of *thirty days* the taxpayer's right to appeal to the Board from *deficiency assessments* by the Treasurer [Sec. 57(a)], and likewise limiting to the same short period of thirty days the time for bringing suit in court after the Board's decision and payment under protest [Sec. 76(a)].

(d) Where the Legislature intended recourse to the courts or appeal to the Board (as in relation to deficiency taxes), it made *express provisions* to that end, expressly limiting the time within which the right might be exercised. It did not leave it to be gathered from inferences or from the absence of express enactment (Brief for Petitioner, Point II—E, p. 25).

(e) The Legislature in restoring by section 75 the authority of the Treasurer to make refunds of voluntary overpayments, in form quite analogous to that which had been given him by section 66 of the earlier Act of 1919, which had been wiped out by the Act of 1921, saw fit not expressly to restore the recourse to the courts from the Treasurer's decision which had expressly been given by the second paragraph of section 66 of the earlier 1919 Act, and which, under that 1919 Act, had been recognized and applied by the Supreme Court of Puerto Rico because of the express authority given by the second paragraph of that section 66 of that Act. (*Serralles vs. Treas-*

urer, 30 P. R. Rep. 220, 223-224; *McCormick v. Treasurer*, 44 P. R. Dec. (*Spanish ed.*) 432, 438-440. [*Confer* Brief for Petitioner, Point IV, pp. 29-32].

3. There is nothing in section 76(b) to override the intent of the Legislature, thus clearly indicated as above. Section 76(b) contains no affirmative words of grant. It is wholly negative. It is the second paragraph of a section, of which the first paragraph [sec. 76(a)] admittedly relates solely to deficiency taxes, and of which the title given to the whole section by the Legislature is "*Limitations upon suits and proceedings by the taxpayer*". As JUDGE MORTON said (R. 35):

"It says in effect that no suit shall be maintained in any court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review '*according to the provisions of law in that regard and the regulations established in pursuance thereof.*' The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which have been paid." (*Italics are Judge Morton's*)

4. As noted in our "Brief for Petitioner" (Point IV, (6) (7), pp. 33-35) the Legislature modeled section 76(b) very closely upon the phraseology of section 3226 of the United States Revised Statutes as amended by section 1014(a) of the Federal Revenue Act of 1924, but the Legislature *significantly* omitted the provision of the Federal statute permitting "suit or proceeding" to be maintained "whether or not such tax * * has been paid under protest or duress". This omission by the Legislature was necessarily intentional and significant.

5. Section 1795 of the Civil Code of Puerto Rico to which respondent makes reference (*Brief*, p. 21) was

apparently not considered applicable by the Supreme Court of Puerto Rico, and was not mentioned anywhere in its opinion nor in the opinions of either of the Judges of the Circuit Court of Appeals. It is simply a statement of a general principle of law (section 1895 of the Spanish Civil Code) not greatly differing from the corresponding principles of the common law. It does not override the rule that the sovereign may not be sued, except with its own consent. Puerto Rico is "sovereign" in this respect. *Porto Rico v. Rosaly*, 227 U. S. 270.

The case of *South Porto Rico Sugar Co. v. Treasurer*, 26 P. R. Rep. 446, which respondent cites (*Brief*, p. 21), so far from supporting respondent's contention, expressly recognizes that the "rule is firmly established" that "taxes paid voluntarily cannot be recovered" [Syl., Point I, p. 446; June 29, 1918; in the absence, of course; of any express statutory authority for such recovery].

6. The decision of the Supreme Court of Puerto Rico that the Legislature intended to give finality to the Treasurer's decision of the "correct amount of the tax" on a petition for refund of a voluntary supposed overpayment, under section 75 of the Act, is surely not "clearly wrong". Under the settled rule of the respect to be paid to the decision of a local Territorial court of last resort construing a local statute, it should not be disturbed. JUDGE MORTON was correct in saying (R. 36):

"The Supreme Court" [of Puerto Rico] "accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, 'If the decision of the Treasurer is against him he cannot appeal from the same to Courts of justice.' This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without

protest may be reopened on claims for refund at any time within four years and resettled *de novo* in court proceedings. This is in fact what is approved by the decision in the Yabucoa Sugar case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong."

References to the record in this memorandum, as in our "Reply Brief", are to the record as printed by the Clerk of this Court. References in our "Brief for Petitioner" are to the pages of the record in the Circuit Court of Appeals filed here with the Petition for Certiorari ["Folios" in the record as printed here].

Respectfully submitted,

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BRIEF I

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